

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1280

To be Argued By
Frederick H. Block

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Appellee,

-against-

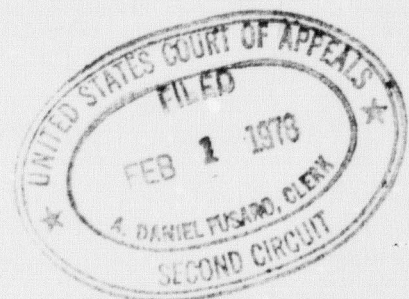
JUAN RAMON VASQUEZ,

Appellant.

-----X

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Introductory

Even if the "farce and mockery" standard obtains (but see the very recent decision of this Court in Tolliver, slip. op. 863, 877), appellant should be held entitled to a new trial. The appellee's claim that appellant had the benefit of "vigorous, competent and dedicated representation" (Br. p. 20) blandly glosses over counsel's egregious failures which show a gross and shocking lack of competence.

Apart from the matters raised in appellant's points, discussed below, the speciousness of appellee's approach appears from its attempt to excuse on the ground of excessive zeal such examples of counsel's appalling failings as his ignorance of the controlling authorities on the issue of an agent being wired for sound (Appt's Br. p. 6); his conduct in communicating with a co-defendant without obtaining permission of the latter's counsel (Tr. p. 675); and his lamentable cross-examination tactics (Appt's Br. pp. 8-9).

I

The Failure to Press for Fraticelli's
Testimony.

Obviously Fraticelli's testimony would have been material on the entrapment defense, but counsel did nothing to secure his testimony. Turbide, relied on by appellee (Br. p. 18), actually emphasizes counsel's deficiency in the case at bar. Even if the government had not been required to produce Fraticelli, it would have been bound under the circumstances here to furnish such information

as it had concerning his whereabouts and reasonable cooperation in securing his appearance (558 F 2d at p. 1060).

But the record fails to show that counsel took any steps whatsoever to attempt to secure Fraticelli's appearance.

Appellee's suggestion (Br. p. 19) that counsel's failure to press for Fraticelli's appearance at trial was a tactic, is met by the undisputed fact that Vasquez had no narcotics convictions (Tr. pp. 659-661) and in other respects is pure speculation.

II

The Reyes and Lugo Situations.

Appellee in discussing appellant's claim that trial counsel failed to protest frivolous claims of privilege asserted by Reyes and Lugo, is in error in defending trial counsel's actions under the circumstances here (Br. pp. 19-20).

As to Reyes

Reyes who had pleaded guilty to counts 3, 4 and 5 thus leaving open the conspiracy count and the first substantive count, had no valid privilege to assert,

notwithstanding Domenech relied on by the appellee.

United States v. Anglada 524 F 2d 296 (2 Cir. 1975) rather than Domenech is the controlling authority here.* Counsel instead of readily acquiescing in the statement by Reyes's counsel that his client would claim the privilege on the basis of the open counts (Tr. p. 673) should, as suggested in Anglada, have asked the judge to take a harder look at the matter and offered to be allowed to ask some carefully phrased limited questions.

As to Lugo

When Lugo took the stand he asserted his privilege on the ground that he had "outstanding charges" against him in the State Supreme Court (Tr. p. 677). Without making any inquiry as to the nature of the charges, appellant's counsel simply gave up (Tr. p. 678). Yet in Anglada, where a state court drug charge was pending

*Domenech in suggesting that the defendant could be prosecuted in New York overlooked N.Y. CPL sec. 40.20. It also overlooked the careful voir dire used in this District which would preclude any routine application to withdraw a plea of guilty. United States v. Giuliano 348 F 2 217 (2 Cir. 1965). In any event Reyes never attempted to withdraw his guilty plea and was sentenced (Br. p. 2).

against the prospective witness, this Court indicated that that fact alone did not preclude a careful inquiry directed toward the eliciting of testimony.

III

The Agency of the Buyer Theory.

It is true as appellee argues (Br. p. 20), that under the present drug law the cases have ruled out the "procuring agent" defense. But none of the cases that have passed on the point with the exception of United States v. Jackson 482 F 2d 1264 (8 Cir. 1973) have involved the situation here where the "agent" who merely made the introduction and had no stake in the venture, did not "deliver" the narcotics or receive any of the money involved. In Jackson, the point made here, was not argued or discussed.

Because of the appellant's unique role in this case* the court should have been requested to have the jury consider whether it could find that appellant was the procuring agent of the buyer. If the jury could have so found,

*Vasquez had testified that when he told Fraticelli he was not selling dope, Fraticelli told him to get somebody else-- and he did in the person of Reyes (Tr. pp. 689-690).

it could well have acquitted on the conspiracy charge as well as the substantive counts because the conspiracy charge against appellant was basically predicated on the sales by Reyes.*

*It is not disputed that Vasquez was in a hotel room during the entire Chicago trip (Br. p. 12). Vasquez testified that he went to Chicago because he had been promised \$5,000 for the trip (Tr. p. 705).

CONCLUSION

For the reasons set forth herein and in appellant's main brief, the judgment should be reversed and a new trial ordered.

Respectfully submitted

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